

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RAUL C. ZAPATA,

Plaintiff,

v.

Civ. No. 07-130 WJ/RLP

RONALD TORREZ, *et al.*,

Defendants.

MAGISTRATE JUDGE'S REPORT & RECOMMENDATION¹

1. This is a proceeding brought pursuant to 42 U.S.C. § 1983. By the district court's Orders [Doc. 41 & 60], the only remaining defendant in this action is Elizabeth Nedler, identified by Plaintiff as "Nurse Liz." The claim asserted against Defendant is that she denied medication to Plaintiff. This claim will be broadly construed to be an Eighth Amendment claim of denial of medical care.

2. The Court requested Defendant to submit a *Martinez* Report concerning Plaintiff's claim [Doc. 58]. The Report was submitted on March 31, 2008 [Doc. 62]. Defendant was given 14 days after submission to file his response thereto. The court now has the Report and the Response.

3. Pursuant to the materials submitted, Plaintiff filed two grievances against Defendant for withholding medication. See Grievance 006978 & 006979, attached as exhibits to the Complaint [Doc. 1]. Both grievances were signed by a supervisor at

¹ Within ten (10) days after a party is served with a copy of the Magistrate Judge's Report and Recommendation that party may, pursuant to 28 U.S.C. § 636 (b)(1), file written objections in the United States District Court to the Report and Recommendation. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the Report and Recommendation. If no objections are filed, no appellate review will be allowed.

Bernalillo County Metropolitan Detention Center ("BCDC") as having been received, but there is nothing on the forms (or any other documents submitted by either party) to indicate whether any action was taken. Pursuant to the Affidavit of Matthew Elwell, the Operations Administrator of BCDC, in neither instance was an appeal taken. See Exhibit E to *Martinez* Report. BCDC's policies require an inmate to take an appeal from an adverse decision. See Exhibit D to *Martinez* Report at pp. 12-13.

Plaintiff's Response to the *Martinez* Report [Doc. 64] does not address the aforementioned grievances. Defendant raised the failure to exhaust as an affirmative defense in her Answer and Plaintiff has failed to rebut this contention. Accordingly, Plaintiff has failed to meet the exhaustion requirements of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) and his claims must be dismissed. See *Jones v. Bock*, -- U.S.--, 127 S.Ct. 910, 921-922 (2007).

Finally, Plaintiff recently filed a Motion for Injunctive Relief. Plaintiff is currently incarcerated in Las Cruces, New Mexico. The instant lawsuit was filed against individuals working at BCDC, all of whom except the defendant nurse have been dismissed. Plaintiff alleges he is being denied medical care at the new facility. Even assuming he states a colorable claim, Defendant herein is unable to provide Plaintiff with the relief he seeks. Therefore, I recommend that the Motion for Injunctive Relief be denied.

Recommended Disposition

I recommend that the Motion for Injunctive Relief [Doc. 61] be denied and I recommend that this action be dismissed without prejudice.



Richard L. Puglisi
United States Magistrate Judge